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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL., *Appellants*,
vs.
LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Opinion of the Courts Below and Jurisdiction.

The District Court of East Baton Rouge Parish in the State of Louisiana rendered an opinion which is found in the record at pages 17 to 20. The opinion of the Supreme Court of Louisiana (R. 30-31) is found in 168 Louisiana Reports 1030. The issues presented in this case were the same as those presented in *Silas P. Borden, et al. v. Louisiana State Board of Education, et al.*, decided by the Supreme Court of Louisiana on the same day (R. 30). This decision is found in 168

Louisiana Reports 1005. Motion for rehearing in the present case was denied July 8, 1929 (R. 46-48), 168 Louisiana Reports 1030. Paragraph 1 of Rule 12 has been complied with by filing Statement in Support of Jurisdiction in due time.

Statement of the Case.

The state of Louisiana by Acts 100 and 143 of the General Assembly for the year 1928 (hereinafter quoted), authorized and appropriated the sum of $750,000.00, or so much thereof as might be necessary, to be paid from the public tax fund of the state to the State Board of Education for the purchase of school-books to be supplied free to all the school children of the state, (excepting those attending colleges and universities) including children attending private schools, where tuition is charged, and sectarian schools. The plaintiffs below, as citizens of the state of Louisiana, taxpayers thereof, and patrons of the public schools of the state, brought an action in the state District Court of East Baton Rouge Parish (R. 1-9), praying for an order restraining the State Auditor of Public Accounts, the Treasurer of the State of Louisiana, and the Louisiana State Board of Education from using or distributing any of the public monies as authorized and appropriated in the Acts above mentioned for the purchase of school-books to be supplied free to all the school children of the state, on the ground that such Acts were in violation of the State Constitution and of Section 4 of Article IV of the Constitution of the United States and the 14th Amendment thereto (R. p. 6, pp. 15-a; R. p. 7, pp. 16-g) as a taking of private property without due process of law and contrary to guaranteed republican form of

government. The Respondents in their answer admit that the textbooks are to be furnished to all school children and seek to justify the furnishing of such books to private as well as public school children (R. p. 16). The order was denied by the District Court (17-20) on the ground that the plaintiffs, as taxpayers and as patrons of the public schools, were without right to sue (R. 20). Thereupon the plaintiffs applied to the Supreme Court of Louisiana for writs of mandamus, prohibition, and certiorari (R. 20), invoking the supervisory jurisdiction of that court to obtain an order restraining the defendants from proceeding under the Acts, renewing their objections to the validity of the Acts under the State Constitution and under Section 4 of Article IV of the Federal Constitution and the 14th Amendment thereto (R. p. 25, pp. 14-a; p. 27, pp. 14-g). The Supreme Court of Louisiana upheld the right of the defendants as taxpayers to maintain the action, interpreted the Acts as allowing and requiring the expenditure of the public monies for the purpose of supplying school-books free to children attending both public and private schools, (R. 38) and held (three judges dissenting) that the Acts were valid both under the State Constitution (R. 39-40) and the Federal Constitution (R. 40) as a valid exercise of the police power (R. 39); that the taxes were levied for a public purpose (R. 40), and that the levying of taxes under these Acts was for an ordinary obligation and expense of government (R. 37). The Supreme Court denied a motion for rehearing (R. 48) and the case is here on appeal from the decision below and denial of the motion for rehearing.

Specification of Errors.

1. The court below erred in holding that the purchasing and supplying of free school books by the state out of public tax funds, for the use of all the school children of the state, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the state is "an ordinary obligation and expense of government."

2. The court below erred in holding that the purchasing and subsequent granting or lending, of free school books by the state out of public tax moneys, for the use of all the school children of the state, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the state, is permissible as exercise of the police power of the state; that it is for a public purpose so as to authorize the expenditure therefor of state funds; that it does not constitute a taking of the property of plaintiffs, as taxpayers and as patrons of the public schools of the state, without due process of law, in violation of the 14th Amendment to the Constitution of the United States; that it is not in violation of Section 4 of Article IV of the Constitution of the United States which guarantees to every state a Republican Form of Government.

Statutes in Question.

"Act No. 100

Books for School Children to be Paid Out of Severance Tax Fund.

"House Bill No. 90.

"An Act

Providing for the Distribution of the Severance Tax Fund; First, for the Purchase of School Books for School Children and the Balance Thereafter to the Public School Funds of the State of Louisiana.

"Section 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided

by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public School funds.

"Section 2. That the State Board of Education of Louisiana, shall provide the said school books for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

"Section 3. That this Act shall not apply to persons attending colleges and universities." *Act No. 100 of the General Assembly of the State of Louisiana for the year 1928.*

"Act No. 143.
"General Appropriation Act.

"House Bill No. 51.
"An Act

Making an Appropriation to Defray the ordinary expense of the government; to pay the interest on the public debt; and to support public schools and public charities in the state of Louisiana; to build and repair public levies; to maintain the state penitentiary; and other state departments for the year commencing July 1, 1928, and ending June 30th, 1929, and for the year commencing July 1st, 1929, and ending June 30th, 1930.

* * * * * * * * *

"Out of the Severance Tax Fund.

"For purchase of free school books for the use of School children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 192[illegible] or so much thereof as may be necessary .....$750,000.00.

"(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928.)" *Act No. 143 of the General Assembly of the State of Louisiana for the year 1928.*

Questions Presented.

No question is presented here as to the right of the state of Louisiana, by means of taxation, to provide text-books free to all the school children attending the public schools of that state. The question presented here is whether, under the Federal Constitution, the state, under the guise of taxation, has the right, as interpreted by the highest court of the state, to take private property to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State of Louisiana, by furnishing text-books free to the children attending such private schools.

ARGUMENT.

The Question whether a Taking of Private Property is for a Public Use is to be determined by this Court.

Appeal is the proper remedy for review of the decision of a state court of last resort, where a state law is alleged to infringe the Federal Constitution and its validity thereunder has been sustained by the state court. *Western Turf Asso. v. Greenberg,* 204 U. S. 359; *Great Northern Railway Co. v. State of Minnesota,* 278 U. S. 503.

The right of the plaintiffs as proper parties to maintain the action was sustained by the court below (R. 35). As this is a decision of a state court of last resort upon a question relating exclusively to rights under state law, and as a question of procedure, it is binding upon this Court.

The construction given the statutes by the highest state court, that they apply to both public and private schools, is binding upon this Court for the purpose of

determining whether the statutes conform to the Constitution of the United States. *Chicago, M. & P. R. Co. v. Minnesota,* 134 U. S. 418; *Missouri Pacific R. Co. v. Nebraska, ex rel. Board of Transportation,* 164 U. S. 403.

In the determination of whether property has been taken by a state by such means as would amount to a deprivation of rights asserted under the Federal Constitution and the highest court of the state has decided that those rights have not been denied, the Supreme Court of the United States may proceed to determine for itself whether those rights have been denied. *Truax v. Corrigan,* 257 U. S. 312.

The assertion, therefore, by the state court, that the taking of private property by means of taxation for the purpose of transferring it by a state law to the aid of private institutions, is a lawful exercise of the taxing power, or of the police power or of any other power of the state, as a taking of private property for public use, where such taking is challenged as violative of rights guaranteed by the Federal Constitution, is not conclusive upon this Court and it may determine for itself whether the taking is in conformity with the Federal Constitution—as a taking for a public use. *Truax v. Corrigan, supra; Fall Brook Irrigation Dist. v. Bradley,* 164 U. S. 112; *Savings and Loan Asso. v. Topeka,* 20 Wall. 655; *Green v. Frazier,* 253 U. S. 235; *Cole v. LaGrange,* 113 U. S. 1; *Parkersburg v. Brown,* 106 U. S. 487; *Meyer v. Nebraska,* 262 U. S. 390; *Lawton v. Steele,* 152 U. S. 133. As was said in *Olcott v. Supervisors of Fond Du Lac,* 16 Wall. 678:

> "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like

> questions of commercial law, no state court can conclusively determine for us."

And indeed, as the Court said in *Truax v. Corrigan, supra*:

> "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Neither the declaration in the statutes themselves nor the decision of the highest court of the state thereupon, that such taking is for a public use or is by due process of law, is conclusive upon this Court. Whether the proposed use is in fact public, is always a judicial question, to be determined by the courts.

> "When the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state." *St. Louis S. W. R. Co. v. Arkansas,* 235 U. S. 348.

TAXES LEVIED BY A STATE MUST BE FOR A PUBLIC PURPOSE.

The power of the state to tax, or to authorize taxation, under the Federal Constitution, is limited by the uses to which the proceeds may be devoted and one of the fundamental limitations is that the use must be a public one.

Parkersburg v. Brown, 106 U. S. 487, 501:

> "Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise)

is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. LaGrange, 113 U. S. 1, 6:

"The general grant of legislative power in the Constitution of a State (Missouri) does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

Dodge v. Mission Tp., 107 Fed. 827:

"A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation or by the exercise of the power of eminent domain, or by any other name, is not a law, but an abitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. For the same reason the power of a legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation."

As said in *Beach v. Bradstreet,* 85 Conn. 344, citing the above cases:

"Every definition of 'taxation' expressly or impliedly asserts that it is to be imposed only for public purposes. This is a foundation principle of all constitutional government." (Citing *Savings & Loan Asso. v. Topeka, supra; Parkersburg v. Brown*, 106 U. S. 487.)

THE TEST TO BE APPLIED IS WHETHER THE PUBLIC HAS A COMMON AND EQUAL RIGHT TO THE USE AND BENEFIT.

In the case of taxation, the test to be applied, as respects the purpose or use, is the same as that applied when property is sought to be taken by right of eminent domain. Applying this test, it is uniformly held that property may not be taken by eminent domain for an object in which the *public has not a common and equal right to the use and benefit* and that private schools not under public control, come within this category.

In *Cole v. LaGrange*, 113 U. S. 1, 8, it is said:

"But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends."

Missouri P. R. Co. v. Nebraska, 164 U. S. 403:

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for

their own benefit, without reserving any control of the use of such land, or of the building, to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public."

The leading State case on the subject is *Connecticut College v. Calvert*, 87 Conn. 421, which rests on *Jenkins v. Andover*, 103 Mass. 94, and *Curtis v. Whipple*, 24 Wis. 350—the two cases expressly approved by this Court in *Savings & Loan Asso. v. Topeka*, 20 Wall. 655, as hereinafter pointed out. In *Conn. College v. Calvert*, it is said:

"Neither the industry of counsel nor our own research has discovered any case (subject to the exception already noted) in which the courts have sustained as constitutional a grant of the right of eminent domain in favor of a private corporation administering a purpose governmental in its nature, whether educational, charitable, or otherwise, except when there was secured to the public a common and equal right to the use or benefit of the property taken. * * *

"It is a matter of common knowledge that there are many colleges for the higher education of women in which the public have not, and cannot acquire, the right to be educated.

"We find no authority in the decided cases for the position that colleges stand in any different relation to the state from other public charities, and we are unable to see how any distinction can be drawn which would justify the delegation of the power of eminent domain to colleges, while denying it to private hospitals, orphan asylums, or cemeteries."

Opinion of the Justices, 211 Mass. 624:

> "Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage earner. Neither the power of taxation nor of eminent domain goes to this extent."

Under these cases, therefore, it is of the essence of the justifiable taking of private property under authority of the sovereign that it must be for a use which is public compensation for the taking; and that due process under the Constitution of the United States, implies the giving of some equivalent in the benefits which are supposed to flow to the one whose property is taken, in common with the public, by reason of the taking—benefits comprehended under the phrase "public use" requiring, nevertheless, a reservation of control by the state over the use to which the property is to be devoted and some common and equal right of use, convenience, benefit, and access to all the public.

PRIVATE SCHOOLS DO NOT COME UNDER THE CATEGORY OF PUBLIC USE.

That statutes authorizing the aid of private schools by taxation, levy taxes for a private, as distinguished from a public purpose, is a principle established and approved by the decisions of this Court. The principal case is *Savings & Loan Asso. v. Topeka,* 20 Wall. 655, which rests upon and expressly approves *Jenkins v. Andover, supra,* and *Curtis v. Whipple, supra.*

In *Savings & Loan Asso. v. Topeka*, 20 Wall. 655; the subject was reviewed at length. This Court said:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.
>
> "It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.
>
> "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in

favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. * * * In the case of *Lowell v. Boston,* in the Supreme Judicial Court of Massachusetts, the validity of this Act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. (111 Mass., 454). The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins v. Anderson* (Andover), 103 Mass., 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided by State Court of Wisconsin in the case of *Curtis v. Whipple,* 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting v. Fond du Lac,* already cited, the principle is fully considered and re-affirmed.

"These cases are clearly in point, and *they assert a principle which meets our cordial approval.*" (Italics ours.)

In *Curtis v. Whipple* (cited and approved in *Savings & Loan Asso. v. Topeka, supra*), 24 Wis. 350, by an act of the legislature the town of Jefferson was authorized

to raise by tax $5,000, to aid in the erection of buildings for the "Jefferson Liberal Institute," in the town, in case the majority of the votes cast upon the question at a special town meeting should be in favor of the tax. The question was decided in the affirmative and Whipple, as town treasurer, proceeded to collect the tax. Curtis resisted the collection.

The court in holding the tax void said:

> "The counsel for the plaintiff correctly state the effect of the act of incorporation when they say that the 'Jefferson Liberal Institute,' for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders, through a board of trustees. The town of Jefferson is not a stockholder, and has no voice in its management. The taxpayers in the town, as such, are not stockholders, and have no privileges in the institute that are not common to all the people of this or any other state. The trustees may exclude any or all of the citizens of the town from the institution. * * * It strikes us, 'at the first blush,' that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by act of the legislature does not change its character in this respect. * * * It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of

the kind above supposed. Nor will the location of the institution at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation."

Jenkins v. Andover, 103 Mass. 94, was a suit to restrain the officers of the town of Andover from proceeding to raise money to aid in rebuilding Punchard Free School, a school founded by charitable bequest which vested the order and superintendence of it in trustees, who, though a majority of them were to be chosen by the inhabitants of the town, yet were limited to be members of certain religious societies.

The court discussed the nature of *public schools,* saying:

"Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *

"This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality. * * *

"But the school is not 'under the order and superintendence of the authorities of the town.' The will requires that it shall be under the direction of eight trustees; three of them to be clergymen of three of the religious societies in the town, and the

other five, though chosen by the inhabitants in town meeting, to be members of those societies. All the other inhabitants of the town are ineligible to the office of trustee; and the authorities of the town, as such, have no control over the school. * * *

"If a school can possibly exist which is not under the control of the town authorities, and yet can be called a common or public school within the meaning of the eighteenth article (state constitution) this is such a school. The fact that it is not under the control of the town authorities is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support."

The principles of these cases have been generally adopted by all State courts.

In *Atchison, T. & S. F. R. Co. v. Atchison*, 47 Kan. 712, it was said:

"Of course, the public is interested in education, and taxes may be authorized and properly levied for the maintenance of public institutions of learning; but in this case the subscription and levy were for private and sectarian institutions * * * While it is argued that the public is benefited by the increase of schools and the spread of learning and knowledge, it is not contended that the colleges in question are under the supervision and control of the public, or that there is or could be any legislaaive authority to expend the public revenues for their support."

In *Opinion of Justices*, 214 Mass. 599, it was said:

"All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words have generally

been understood, must be disbursed exclusively for the support of such schools, and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect."

In *Lowell v. Boston*, 111 Mass. 454, 461 (cited and approved in *Loan Asso. v. Topeka, supra*) Justice Wells reviewed the general principles in cogent language, which "can hardly be surpassed for accuracy and clearness" (211 Mass., 624):

> "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditures which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> The principle of this distinction is fundamental."

The principle derived from these cases is that a use which is denominated a "public use," as justifying the taking of private property under either the taxing power or the power of eminent domain, requires a right secured to the public to enjoy the objects for which the tax is levied upon such terms as the public, itself, may lay down, and the control of which the public has reserved even after the aid has passed to the object to which it is granted. If the public, therefore, has not access to that use or participation in, or right of participation in, and some right of control over, that use, for the aid of which the state has taken their property, then such use is not a "public use" and the statute under which the state acts is invalid.

Applying these principles to the case here, it is apparent that the public does not and can not have the right of access to, or participation in, the use—the private schools. A private school may limit its patrons in any manner that it chooses. It may limit them to persons of the Ethiopian race; or to persons of Japanese extraction; or to persons in a certain district; or to persons of a certain degree of birth; or to persons of a certain sect; or to a limited number of persons such as ten or five; and the state cannot restrain such action. The right of control by the state over private schools is greatly restricted (*Meyer v. Nebraska,* 262 U. S. 390); the state has little or no control or supervision over the instruction or instructors in private schools—an essential element in *Jenkins v. Andover, supra.*

Thus, in effect, a taxpayer would be required by such a statute as is here in question to transfer a part of his property to an institution from which he would be or might be debarred from receiving any benefit, or

any right to benefit, or any control over the disposition of such property. This is a plain taking by legislative fiat of the property of A and transferring it to B. And of such action Mr. Justice Story said in *Wilkinson v. Leland, et al.*, 2 Pet. 627, 657:

> "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. * * * We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union."

It is true that the education of the youth is a matter of public concern; it has been held so from ancient times. But it is equally true from antiquity that the public agencies of education of the youth have been the only institutions which the state has required its citizens to support—institutions to which all the citizens had the common and equal right of attendance. The use was one devoted to the public; one in which all the public had the right of participation. The statement, therefore, that the statutes here are valid because applying to all the school children is unsound, since it is perfectly apparent that the public does not and cannot enjoy the objects for which the tax is levied.

Furnishing free text books is an aid to private schools.

The furnishing of text-books free by the state to school children attending private schools which

charge tuition and require the children to furnish their school books, is essentially, and as a practical matter, an aid to such private institutions by furnishing a part of the equipment of such private schools; if not directly, it is certainly indirectly. If the legislature may not levy a tax for the aid of private schools it may not indirectly do the same thing. In state cases, generally, wherever the question has arisen, it has been recognized that the furnishing of free text-books and the analogous furnishing of tuition of the pupils, constitute aid to the schools.

In *Underwood v. Wood*, 93 Ky. 177, 15 L. R. A. 825, Judge Pryor said:

> "The act incorporating the academy in substance provides that Robinson may contract with the parents of children residing within the common school district for teaching their children, and the parent or parents making such contracts, paying doubtless a higher price than the amount of the ordinary school tax, are exempt from the burden of maintaining, furnishing, or repairing any schoolhouse, for and during the school years their children may be sent to the Taylor Academy. There are not less than 350 children within the common school district (two of the districts having been consolidated), and out of this number, by the provisions of the Act, Robinson can select such as he may desire to attend his school, by making a contract with their parents; and, having done so, these children attending the academy get their part of the common school fund, to be paid to the teachers of the college, and in this manner diverting the fund from the common school to the payment of teachers in an individual enterprise, and relieving its patrons who live within the district from the burden of taxation imposed for building and keeping in re-

pair the school buildings, erected for common school purposes. * * *

"If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for establishing a precedent that must, if followed, destroy the very existence of common schools. This court has held in several cases that when graded schools have teachers under the control of the common school trustees, and where all children have the benefit of the school within the district, that the fund may be appropriated to the payment of the teachers. In this case the trustees have no voice in the selection of the teachers, nor can any child go to the academy as a pupil without paying tuition, *and in fact the legislative Act has applied the school fund to be used by a private institution.*" (Italics ours.)

The contention that such books are furnished to the children attending such schools was dealt with in *Smith v. Donahue,* 195 N. Y. S. 715, 202 App. Div. 656, 661, which was an action brought to restrain defendants, Board of Education, from procuring with public funds and delivering free text-books and ordinary supplies for the use of pupils of schools other than the public schools of the district:

"These books have been procured by the Board of education and delivered to the school; but the defendants say that books and supplies while so procured and furnished, are furnished under the above section of the Education Law (Sec. 864, subd. 4) to the children attending the schools and not to the schools. Even though we accept the

statute as meaning that the books and supplies are to be furnished to the pupils and not the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it is certainly in indirect aid. The scholars do not use text-books and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the text-books and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools; neither can there be such a thought in the case of the parochial schools."

In *Dakota Synod v. State*, 2 S. D. 366, it was held that the payment by the state of the tuition of a designated class of students in a sectarian university, controlled by a Presbyterian corporation, for instruction in the methods of teaching in the public schools, was an appropriation for the "benefit of" or "aid to" a sectarian school. Upon the same principle was decided the case of *Williams v. Stanton Graded Common School Dist.*, 173 Ky. 708.

If the furnishing of text-books free to children attending private schools is not considered an aid to such private schools, but as incidental to the state educational system, then it logically follows that the tuition of the children attending such schools could be paid; their transportation to and from such schools could be provided; the salaries of the instructors could be paid in part or in whole; and finally, the buildings themselves could be erected with state funds; all which, under the reasoning evinced in the statutes of Louisiana, might be justified on the ground that it is the interest of the state to see that its youth are educated.

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the Federal Constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and without any special obligation of the state, charitable or otherwise, to such persons.

In *Savings and Loan Asso. v. Topeka,* 20 Wall. 655, it was said:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been held in state cases, and applied to aid to those attending private schools.

In *State v. Switzler,* 143 Mo. 287, the court said:

> "The same authority is found in the Constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed 'the higher or university education;' but we find no warrant for either in the organic law of this state or in the character of our government. * * *
>
> "The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *
>
> It is only necessary to add that counsel for the

> curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers.' "

As the court said in *Beach v. Bradstreet*, 85 Conn. 344:

> "No public purpose is subserved by taking by taxation the property of the many and giving it, under the guise of state support, to those who are out of reach of its need."

The aid is granted here not only to those who *are* out of reach of its *need* (children attending private schools), but also to those for whom the state has already provided.

If the principle upon which there is allowed a diversion of the public school funds for the benefit of private individuals, is sanctioned, then the division of the public schools funds may be permitted, so that ultimately those whose children attend private schools, under the simulation of bearing the burden of taxation for the public schools, are paying for the maintenance only of their own private schools. This finally means, in effect, the deprivation of the state of its power of taxation (for the support of the public schools) of those who support only their private schools—and practically the destruction of one of the free institutions under our republican form of government.

The distinction between the case here and those affirming the constitutional authority of the state to aid railroads or to engage in private enterprises serving the public (*Green v. Frazier*, 253 U. S. 233) is that in

the latter cases there is secured to the public both public control and common and equal right of use. *Savings & Loan Asso. v. Topeka*, 20 Wall. 655; *Green v. Frazier, supra; Connecticut College v. Calvert*, 87 Conn. 421; *Curtis v. Whipple*, 24 Wis. 350; *Jenkins v. Andover*, 103 Mass. 94.

In the case of private schools, whether sectarian or not and whether run for profit or not, there is lacking this element of public control and common and equal right of the public to use. As regards the constitutional question, therefore, private schools stand on precisely the same footing as a privately owned manufacturing industry or any other private enterprise, and they have been so considered by this Court in the cases cited.

The principle for which we here contend is fundamental and vital in our form of government. As said by the Supreme Court of Connecticut in *Beach v. Bradstreet*, 85 Conn. 344:

> "A republican form of government forbids the raising of taxes for any but public purposes, and under article fourth, section 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government, and cannot exercise legislative power inconsistent with it."

Conclusion.

The limits to which states may go in taking private property, though of somewhat wide range, are definitely confined by the Federal Constitution and the cases decided under it, to such a taking only for a *public use*. While a public use, itself, embraces an increasing variety of things, because, doubtless, of

our complex mode of living, yet the principles upon which a public use is determined have been unvaried throughout the cases. The requirements of a public use as deduced from these cases, are: the use must be available to the public and there must be a capability of public use; the public must have or reserve some control over the use; some benefit must flow directly to the public from this use; the "promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object."

It may be difficult, in every case, to draw the line between what is, and what is not, a public use; but a line must be drawn somewhere or the limitations on the taxing power are meaningless and futile. But though hard to draw, there are some things that plainly and beyond doubt fall on one side or the other of the line. Among the uses which clearly fall on the private side, are those in which the public has neither control, as such, nor common and general access to or benefit from. Here is where this Court has drawn the line in *Savings & Loan Asso. v. Topeka, supra,* as plainly and unequivocally marked out. And here is the crux of this case.

Since that interpretation of the Constitution, there have been no changes of condition that make this interpretation inapplicable to the kind of case here presented. Private schools have not changed their nature; public schools have tremendously grown and expanded and any supposed need to commit the education of the youth to private enterprises uncontrolled by the state because of the inability of the state to perform its

functions, has diminished rather than increased. Therefore any thought that the Constitution is broad enough to meet the changing conditions of society has no application here. The principles announced in *Savings & Loan Asso. v. Topeka, supra,* are as sound and applicable, under present day conditions, as they were a hundred years ago.

Without discussing the theories as to how far the state may go in entering businesses heretofore conducted by private enterprises, or how far the state may go in aiding enterprises conducted by private individuals, but over which the state reserves and exercises control, at least to the extent of securing common and equal access and benefit on terms prescribed by the state—theories which are not before the Court in this proceeding—we present here the single question, whether a state having a common school system, controlled by the state, to which all children have access on terms prescribed by the state and to which all taxpayers have equal and common benefit, and supported by taxation upon all the citizens by a levy of general taxes, may divert any of the funds so raised, to the aid, support, or maintenance, in any form, of admittedly private enterprises offering common schooling of the grade offered by the public schools, where the entire control, at least to the extent of selecting those who may receive the benefit and have the access, rests wholly in private hands—in a religious and sectarian organization or in an individual, association or private corporation for profit. To ask the question is to answer it, if taxation, under the Federal Constitution, in all the states, must be confined to a "public use," as

that expression is and always has been understood since the adoption of the Constitution.

Respectfully submitted,

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